resale obligations. GTE disagrees, however, that the hyper-separation requirements proposed in the *NPRM* are necessary either to avoid incumbent status or to justify non-dominant treatment. Rather, the existing separation rules governing independent ILEC provision of in-region interLATA services effectively assure non-discrimination and prevent cross subsidization while permitting the competitive affiliate to take advantage of legitimate efficiencies of scale and scope. Indeed, GTE Communications Corporation (GTECC) has provided competitive interexchange services for almost two years under these same safeguards.

GTE also provides nondominant local exchange service through GTECC in many states, including, in some cases, the service territory of GTE ILECs. In those instances, GTE has implemented additional separation requirements that prevent GTECC from obtaining any market advantage from the ILEC's position.[27] The touchstones of GTE's policy are that: (1) GTECC must be in the same position as other competitors with respect to the ILEC's common carrier services and cannot benefit from or trade upon the market power or position of the GTE ILECs in any respect; (2) the GTE ILECs cannot discriminate in favor of GTECC and GTECC and the GTE ILECs

---

[27] While GTE does not believe that this type of additional separation is necessary for advanced services, it does evidence both GTE's experience in operating separate dominant and non-dominant entities in compliance with the Commission's Rules and GTE's sensitivity to the Commission's concerns expressed in the *NPRM*. Indeed, GTE's internal rules exceed the requirements of both § 272 and the *Fifth Report and Order*. Notably, the Commission has permitted an interexchange entity to operate in-franchise on a nondominant basis with its ILEC affiliate, and to jointly market where traditional local exchange service is involved. No greater level of separation could reasonably be required for an advanced services affiliate, since neither that affiliate nor the ILEC has any market power with respect to advanced services.

must be operated as separate businesses; (3) the GTE ILECs and GTECC communicate with each other through wholesale channels just as the ILEC would with any other unaffiliated carrier; and (4) GTECC takes services from GTE ILECs pursuant to tariff or interconnection agreement, like any other CLEC, with no joint ownership of facilities.[28]

In recognition of the demands of the emerging advanced services marketplace and in light of its own experience, GTE therefore proposes that the Commission define the "optional alternative pathway" in line with the following requirements:[29]

An ILEC's advanced service affiliate should maintain separate books of account.[30] As proposed in the *NPRM*,[31] the ILEC and its advanced services affiliate should maintain separate books of account. This is a reasonable requirement that the affiliate's expenses, revenues, and investment are not inter-mingled with those of the ILEC.

---

[28] The foregoing philosophy is documented in a handbook that every GTE employee must read and adhere to. A copy of the handbook is appended hereto as Appendix 1.

[29] GTE does not intend that the separate affiliate requirement be a permanent fixture. Rather, as the ILECs continue to lose market power, and as competitive alternatives to the local loop continue to emerge, ILECs should be permitted to provide advanced services directly on a non-dominant basis, without being subject to § 251(c). In this regard, the Commission should state that it will re-examine the need for the separate affiliate requirement no later than two years after its implementation. In the interim, if competitive conditions warrant, an ILEC is of course free to seek forbearance from the requirement (and the associated provisions of § 251 and the Commission's tariffing rules) under §§ 10 and 706 of the Act.

[30] 47 C.F.R. § 64.1903(a)(1).

[31] *NPRM*, ¶ 96.

The affiliate should not jointly own transmission or switching facilities with the ILEC, but should be permitted to transfer personnel and other resources or assets that were deployed before the final date of the Commission's order resulting from the *Advanced Services NPRM*.[32] The prohibition on joint ownership of transmission and switching facilities will minimize cost allocation, cross subsidization and discrimination problems. At the same time, allowing the affiliate and the ILEC to transfer personnel and other resources and assets (on a compensatory basis) will enable the affiliate to respond quickly and efficiently to consumer demand and avoid the costs of replicating necessary staff and resources that already exist elsewhere within the corporate structure. The ability to achieve such efficiencies is eminently fair; after all, the affiliate's vertically integrated competitors, including AT&T, MCI WorldCom, and Sprint, face no restrictions on their ability to redeploy personnel and other resources among their various lines of business in order to compete most effectively.

Prohibiting ILECs from making such transfers would be truly perverse, since ILECs are now deploying ADSL service in order to meet customer demand – and thereby advancing Congress's § 706 goals – but would be forced to discontinue such deployment while they await the issuance of the precise rules under which an affiliate might deploy this service. This perversity would only be exacerbated if ILECs were not permitted to discontinue service while awaiting the Commission's order. In other words, if the Commission's order establishes rules for a separate advanced services affiliate but nonetheless requires ILECs to maintain (and perhaps expand) the services they

[32] 47 C.F.R. § 64.1903(a)(2).

have deployed prior to the order in this proceeding, then the "optional alternative pathway" would be a mere illusion.

Obviously, no one desires that carriers discontinue deployment of advanced services. But, they should not be penalized – in the form of undermining the ability of a separate affiliate to provide an advanced service – simply because the ILEC has acted prudently in bringing advanced services to market while awaiting the Commission's order. Therefore, the Commission should permit transfers in recognition of the structural changes a corporate parent may wish to make after consideration of that order.

The affiliate should acquire any tariffed services from the ILEC at the tariffed rates and should be permitted to obtain unbundled network elements and services for resale pursuant to an approved interconnection agreement.[33] This requirement assures that the ILEC does not favor the affiliate in the provision of basic telecommunications services. At the same time, the affiliate must have the same flexibility as any other competitive provider to obtain UNEs and resell telecommunications services that the ILEC offers at retail. Because this requirement obligates the affiliate to obtain such facilities and services pursuant to an approved interconnection agreement, there can be no discrimination against unaffiliated competitors. First, under § 252(e)(2) of the Act,[34]

---

[33] *Id.* § 64.1903(a)(3). This requirement appears equivalent to the seventh of the Commission's proposed separation conditions. *See NPRM,* ¶ 96.

[34] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), *codified beginning at* 47 U.S.C. § 153. All references to the Act are to the Communications Act of 1934, as amended by the 1996 Act.

approval of the agreement by the state PUC must be predicated on a finding that the agreement does not discriminate against non-party carriers and is consistent with the public interest.[35] Second, under § 252(i), any other telecommunications carrier can obtain the same agreement as the ILEC negotiated with the affiliate.

The affiliate shall be a separate legal entity from the ILEC.[36] By establishing a separate legal entity to provide advanced services, the common corporate parent of the affiliate and the ILEC can increase the accountability of the affiliate as a separate entity. The Commission should make clear, however, that the corporate parent should be free to combine any or all lines of business other than the incumbent local telephone operations in the separate affiliate. Such flexibility is essential to respond to consumer demand for bundled service packages.

The affiliate may be staffed by personnel hired from the ILEC and should be housed in segregated space.[37] Every single one of the ILECs' competitors in the advanced services market, including the very largest telecommunications companies in the world as well as the huge cable MSOs, can staff its various lines of business as it sees fit, jointly market any and all services offered by any entity, and occupy real estate

---

[35] 47 U.S.C. § 252(e)(2)(A). GTE assumes that the agreement will have been voluntarily negotiated. If arbitration is required, the state commission cannot approve the agreement unless it finds that the agreement is consistent with § 251, including the Commission's regulations adopted thereunder, and the pricing standards in § 252(d). *See* 47 U.S.C. § 252(e)(2)(B).

[36] 47 C.F.R. § 64.1903(b).

[37] *Id.*

as efficiently as possible. None of these companies is required to "make or buy" expertise and services that are already available under the same corporate umbrella.[38]

Moreover, it is a fact of today's evolving telecommunications marketplace that companies hire personnel from one another with increasing frequency. Restricting inter-corporate hiring would affirmatively disadvantage advanced service affiliates *vis-a-vis* other providers. Indeed, while AT&T, MCI WorldCom, the giant MSOs, and a variety of other carriers could hire from one another and from GTE's ILEC, only the separate affiliate would be restricted from hiring from GTE's ILEC.

Companies that have ILEC subsidiaries must be accorded the same flexibility if they are to have a realistic opportunity to compete. These companies already must conduct their advanced service businesses under serious limitations that do not apply to their competitors, including the separate affiliate requirement and strict rules governing transactions between the ILEC and its affiliates.[39] They must not be further disabled by obligations that prevent them from realizing legitimate efficiencies that are available to all of their competitors.[40]

---

[38] Nothing in this proposal alters the accepted status of service corporations that provide shared services (*e.g.*, legal, finance, human resources) to a parent company and/or any or all of its subsidiaries. The legitimacy of such service entities has been affirmed repeatedly by the Commission. *See, e.g., Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, FCC 96-490 (Dec. 24, 1996).

[39] *See* 47 C.F.R. § 32.27(c).

[40] For this reason, GTE strongly opposes the proposed condition requiring the ILEC to "operate independently" from its affiliate, to the extent that condition prohibits the ILEC from performing operating, installation or maintenance functions for the affiliate. *NPRM*, ¶ 96. Likewise, GTE also opposes any ban on an affiliate's ability to hire away ILEC employees and the proposed "non-discrimination" requirement, to the extent the

(Continued...)

The affiliate should not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the ILEC.[41] This proposal appropriately assures that ILEC assets are not placed at risk if the advanced service affiliate defaults upon its debt. The Commission should recognize, however, that GTE and other holding companies typically finance both ILEC and other operations through the common corporate parent. The rule should not be interpreted to disturb this longstanding practice. Accordingly, the Commission should clarify that the rule is intended only to prohibit using the ILECs' assets as collateral for financing used to fund advanced services affiliates.

Contracts between the ILEC and its affiliate should be disclosed to regulators upon request. This requirement creates an audit trail that can be used if the Commission or state regulators have cause to investigate allegations of improper transactions. At the same time, the requirement to disclose contracts will enable regulators to determine the prices, terms, and conditions under which the ILEC provides service or facilities to the affiliate. The alternative proposal in the *NPRM*, which would require publication within ten days of a written description of all transactions, is no more effective in assuring against discrimination but far more burdensome.

(...Continued)
Commission interprets that requirement to bar the ILEC from transferring to the affiliate equipment already installed to provide advanced services without also offering to sell that equipment to unaffiliated companies on the same terms. *See* Section II.D, *infra*.

[41] *NPRM*, ¶ 96.

GTE respectfully submits that this carefully crafted program of safeguards is more than adequate to address any legitimate competitive concerns and protect customers of the ILEC. At the same time, it is a more flexible and much less intrusive approach than that proposed in the *NPRM*. As a result, GTE's proposed approach will promote more robust competition in the advanced services market by minimizing the distortions created by disparate and overbearing regulation. This enhanced competition will directly benefit consumers by spurring greater innovation, responsiveness, and price-cutting.

2. Targeted modifications to the existing collocation rules will promote competition without creating undue burdens or undermining network integrity.

The second component of GTE's National Advanced Services Plan consists of targeted modifications to the Commission's existing collocation rules. Under those rules, GTE's ILECs have satisfied 110 collocation requests in 16 different states. Although GTE believes that the current rules are working well, it is willing to support the following modifications as part of its NASP, which reflect practices that meet market conditions.

Upon request, collocating parties should have the flexibility to place their equipment in "shared" collocation space dedicated to CLEC use, with or without employing cages. GTE understands the concern of some CLECs that forced use of cages increases expense and delays implementation of the collocation arrangement. Accordingly, GTE has been willing to offer "shared" collocation – that is, creation of space within the central office that is dedicated to CLEC use (and separate from the

ILEC's equipment).[42] Within this space, each individual CLEC is free to use a cage or not, as it sees fit. As of the second quarter of 1998, 24 CLECs are taking advantage of the shared collocation option in GTOC central offices.

CLECs should be permitted to use a third-party inspection in conjunction with state commission review to confirm that space in a central office is exhausted. GTE is sympathetic to CLEC requests to have a means of verifying ILEC assertions that space within a particular central office is exhausted. At the same time, inspections by the CLEC itself are not the best means of verification. Such an approach could result in numerous CLECs all seeking to inspect the same central office. In addition, CLECs do not have an incentive to agree with ILEC findings of exhaustion, virtually assuring disputes that will require resolution by state commissions. As a superior alternative, GTE endorses an approach recommended by Pacific Bell in California, under which a third party could be used to verify an ILEC's exhaustion claim and that finding would be subject to review by the state commission. Upon confirmation by the state commission, the third party's finding would be conclusive with respect to that central office unless and until space becomes available. Its fee would be paid by the CLEC if the ILEC's finding of exhaustion is upheld, and by the ILEC if the finding of exhaustion is overturned.

---

[42] This approach must be distinguished from proposals for "cageless" collocation, which GTE understands to mean mixing of CLEC and ILEC equipment in the same bays. GTE continues to strongly oppose cageless collocation in light of the serious risks to security and network integrity. *See* Section III. *infra*.

CLECs should have the flexibility to lease collocation space in increments of 25 square feet. GTE recognizes that some CLECs may need additional flexibility to request collocation space in amounts that are smaller than present standard requirements. To this end, GTE is willing to reduce the minimum collocation space requirement from 100 square feet to 25 square feet and allow CLECs to request space in increments of 25 square feet. This measure will accommodate CLEC requirements while ensuring that central office space is efficiently allocated and avoiding the problems created by offering space in non-standard sizes.

CLECs should be able to sub-lease space within collocation cages. GTE also supports allowing CLECs to sub-lease portions of collocation cages, as long as the original requesting party remains liable for payment to the ILEC and for security within its collocation cage. This approach may allow CLECs to structure more efficient collocation arrangements and may facilitate the connection of CLEC equipment where necessary.

These targeted modifications to the collocation rules address the CLECs' legitimate requests for a more flexible, timely, and efficient collocation process. GTE respectfully submits that adoption of these recommendations would obviate the need for a more radical expansion of the rules (such as "cageless" collocation with no physical separation of ILEC equipment and national standards for fulfilling collocation requests) and assure network security and integrity.

3. Limited adjustments to the loop unbundling rules will advance competition.

The third element of GTE's NASP proposal consists of changes to the loop-related unbundling requirements set forth in the *Local Competition Order*.[43] As with collocation, GTE believes that those requirements have been effective in enabling competition and that there is no need for those rules to be substantially augmented in order to promote competition in the provision of advanced services. Indeed, as explained in Section I.A above, the ILECs' local loop cannot be considered a "bottleneck" for the provision of advanced services to many customers. Nonetheless, GTE is willing to support certain modifications to the existing loop unbundling requirements, as set forth below:

ILECs should permit sub-loop unbundling upon bona fide request where technically feasible. Through the course of various interconnection negotiations and arbitrations, GTE has agreed to offer sub-loop unbundling upon bona fide request where such unbundling can be provided on a technically feasible basis. Indeed, GTE has signed 132 interconnection agreements that provide for sub-loop unbundling on this basis. Thus, GTE supports a requirement that ILECs fulfill bona fide requests for

---

[43] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *stay granted sub nom. Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *further aff'd in part and vacated in part, as amended on partial reh'g sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *further vacated in part sub nom. California Public Utilities Comm'n v. FCC*, 135 F.3d 535 (8th Cir.), *cert. granted sub nom. AT&T Corp. v. Iowa Utilities Board*, Nos. 97-826, etc. (U.S. Jan. 26 1998).

such unbundling as long as such requests are technically feasible given the specific network facilities at issue and full compensation is received. Nonetheless, because the feasibility of unbundling is dependent upon the type of plant in place,[44] GTE continues to oppose a national rule mandating sub-loop unbundling in all circumstances.

ILECs may voluntarily provide conditioned loops even where they have not deployed advanced services, if they recover their actual costs of performing the conditioning. In the *Advanced Services MO&O*, the Commission directed ILECs to make conditioned loops available upon request. As Bell Atlantic and Southwestern Bell have explained in their petitions for reconsideration, this mandate impermissibly requires the ILECs to offer "superior quality" service in areas where they do not themselves provide advanced services. GTE nonetheless will voluntarily provide conditioned loops, regardless of whether it is in the market for xDSL services an a particular exchange, if it is compensated for its actual costs of conditioning a loop. This commitment, of course, is an integral part of the NASP and will be available for loops that are technically capable of being conditioned

* * *

The NASP program of separate affiliate requirements and modified collocation and unbundling rules described above would lay to rest any residual concern that a company with ILEC subsidiaries could secure an unfair advantage in the advanced services market. At the same time, these requirements avoid imposing such a heavy burden on ILECs and their affiliates that competition and investment in advanced

[44] *See* Section IV.H, *infra*

services will be stymied. Under GTE's approach, consumers throughout the country will benefit from true rivalry among a variety of sophisticated and resourceful competitors. All of these competitors will have strong incentives to innovate, to invest in new technologies and services, and to develop new bundles of services in response to marketplace demand. In contrast, as detailed in the remainder of these comments, adoption of the Commission's proposed separation requirements and safeguards would blunt such incentives and stifle competition in this emerging and vibrant market.

II. THE PROPOSED SEPARATE AFFILIATE REQUIREMENTS AND TRANSFER RESTRICTIONS ARE CONTRARY TO THE ACT AND COMMISSION PRECEDENT AND WOULD UNDERMINE ILEC INVESTMENT IN ADVANCED TECHNOLOGY AND SERVICES. (¶¶ 83-117)

A. Overview

Separation Requirements: The *NPRM* suggests that an incumbent LEC affiliate providing advanced services "is generally not an incumbent LEC" – and therefore not subject to regulation under § 251(c) – only if it complies with a long list of strict separation requirements.[45] Similarly, the *NPRM* proposes that only advanced services affiliates that meet the Commission's onerous new conditions should "be presumed to be nondominant."[46] Specifically, the Commission has proposed seven requirements that affiliates must satisfy to attain non-incumbent status and non-dominant regulation.[47]

---

[45] *NPRM*, ¶ 92.

[46] *NPRM*, ¶ 100.

[47] The Commission has proposed that:

(Continued...)

As discussed in Section II.B of these Comments,[48] several of the proposed separation conditions (those that go beyond the modified *Fifth Report and Order* safeguards) are inconsistent with both the letter and the spirit of the 1996 Act, as well as the Commission's own precedents. Moreover, the prohibition on ILEC provision of operating, installation, and maintenance, the requirement to publish all transactions within ten days, and the ban on common officers, directors, and hiring away of employees are unduly intrusive, unnecessary to ensure nondiscriminatory treatment of

---

(...Continued)

1) Affiliates must not jointly own with the ILEC either switching facilities or the land and buildings on which such facilities are located, and may not obtain operating, installation, or maintenance functions from the incumbent.

2) Affiliates may only engage in transactions with the incumbent on an arm's length basis, and must reduce such transactions to writing and make them available for public inspection on the Internet within ten days.

3) Affiliates must maintain separate books of account.

4) Affiliates must have separate officers, directors, and employees.

5) Affiliates must not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the incumbent.

6) Affiliates must not receive discriminatory treatment from the incumbent in the provision of goods, services, facilities, information, or in the establishment of standards.

7) Affiliates must interconnect with the incumbent LEC pursuant to tariff or pursuant to an interconnection agreement, and any network elements, facilities, interfaces, or systems provided to the affiliate by the incumbent must also be made available to unaffiliated entities. *NPRM*, ¶ 96.

[48] As the Commission requested in the *NPRM*, to the extent possible, the organization of these Comments tracks that of the *NPRM* itself.

ILEC affiliates,[49] and would deter investment in and deployment of advanced telecommunications capabilities.

GTE thus recommends that the Commission reject the proposed separation requirements, and instead apply the same separation rules in the context of advanced telecommunications services that it has already adopted in the analogous realm of provision of in-region interLATA services by independent telephone companies. If the Commission insists on additional separation requirements, however, the proposed safeguards should, at a minimum, be tailored to permit affiliates a reasonable opportunity to compete. GTE submits that the in-franchise internal rules it has established for its in-franchise CLEC, GTECC, go well beyond the requirements of § 64.1903 and adequately and properly address the Commission's stated cross-subsidization and discrimination concerns. Section II.C of these Comments sets forth GTE's specific proposed modifications.

Non-Dominant Status: GTE agrees with the Commission's conclusion that an affiliate offering advanced services, to the extent it provides interstate exchange access services, should, under Commission precedent, be presumed to be non-dominant.[50] As the *NPRM* recognizes, such an affiliate clearly would not possess market power.

---

[49] As further explained *infra* at Section II.B, the affiliate safeguards already in place, as modified by the Commission in the *Non-Accounting Safeguards Order* and elaborated in 47 C.F.R. Parts 32 and 64, are more than adequate to ensure non-preferential treatment of ILEC-affiliated entities.

[50] *NPRM*, ¶ 100. As noted above and detailed herein, GTE does not agree that compliance with the proposed hyper-separation requirements is a prerequisite to non-dominant status.

Moreover, requiring an affiliate offering advanced services to file tariffs, or subjecting it to price cap regulation, would act as a disincentive to invest in advanced technologies, and thus stifle rather than promote competition

Transfer Rules: The Commission also has sought comment on whether ILEC affiliates providing advanced services should be subject to a wide array of restrictions relating to transfers and sharing of assets between ILECs and affiliates.[51] The Commission should decline to adopt any of these restrictions.

First, GTE does not agree that transfers of non-bottleneck equipment, such as DSLAMs and packet switches, should result in regulation of an affiliate as an incumbent LEC. This equipment is readily available to all potential competitors on the open market. Nonetheless, if the Commission does restrict transfers of equipment between an ILEC and its affiliate, it must afford a grace period during which transfers are permitted.[52] GTE also opposes any consideration of restrictions on the so-called "transfer" of employees, brand names, funds, and customer proprietary network information (CPNI) where express written consent from the customer has been obtained. These limitations go well beyond insuring non-discriminatory treatment of ILEC affiliates, to affirmatively discriminating against them (as discussed in Section II.E) and should be rejected. Finally, the Commission should preempt any state regulation

[51] *NPRM*, ¶¶ 106-07, 113.

[52] As further explained *infra* at Section II.D.3, a grace period is necessary to permit a corporate parent to deploy and re-deploy resources in the manner that it would have chosen initially had the Commission's rules been in place, without risking a disruption or discontinuance of advanced services that are currently being offered.

that imposes more burdensome requirements on ILEC affiliates than are adopted by the Commission (Section II.F).

B. The Commission's Proposed Structural Separation Rules Are Inconsistent With The Act And Commission Precedent And Would Harm Competition. (¶¶ 89-103)

GTE urges the Commission not to adopt the new, severely restrictive separation requirements proposed in the *NPRM*. As explained below, those restrictions are not necessary to ensure that ILEC affiliates are not "successors" or "assigns" of the ILEC, are inconsistent with the FCC's own precedents, and far exceed the type of safeguards needed to assure fair competition. Moreover, the proposed separation requirements directly contravene the policies underlying the 1996 Act. As the Commission itself has repeatedly recognized, the intent of Congress in passing the Act was to "provide for a pro-competitive, de-regulatory national policy framework" to accelerate the deployment of advanced telecommunications technologies.[53] The Commission's proposals, however, would greatly increase the regulatory burden and expense on incumbent LECs seeking to bring new advanced telecommunications technologies to market, and would effectively undermine the ability of a corporate holding company to establish affiliates capable of offering the "one-stop shopping" for bundled services that their customers increasingly demand.[54]

---

[53] *See, e.g., Non-Accounting Safeguards Order*, ¶ 1.

[54] *See, e.g.,* Sarah Schmelling, *Bundling Takes on New Meaning*, Telephony, Jul. 13, 1998, at 20.

1. The proposed separation requirements go well beyond what is necessary to ensure that an ILEC affiliate is not a "successor or assign." (¶¶ 90-96)

As the Commission recognizes in the *NPRM*, Congress has authorized the Commission to subject an ILEC affiliate to the requirements of § 251(c) of the 1996 Act only if the affiliate qualifies as a "successor or assign" of the ILEC.[55] Nevertheless, the *NPRM* proposes to apply those requirements to all separate affiliates offering advanced services that fail to comply with numerous newly created and burdensome separation conditions. The Commission does not, however, offer any reason why the proposed conditions are necessary to exempt a separate affiliate owned by a common parent offering advanced services from successor or assign status. In fact, most of the requirements clearly bear no relation to the classification of an affiliate as a successor or assign. It is therefore beyond the Commission's statutory authority to impose the proposed restrictions as a condition of independence from the § 251(c) requirements.[56]

The Commission's entire discussion of the successor or assign issue is contained in only two paragraphs of the *NPRM*.[57] Referring back to the *Non-*

---

[55] *NPRM*, ¶¶ 89-90; *see also* 47 U.S.C. § 251(c) (application limited to "Incumbent Local Exchange Carriers"); 47 U.S.C. § 251(h) (defining "Incumbent Local Exchange Carrier" as the carrier providing local exchange service to a particular area at the time of enactment of the Act, or any "successor or assign" of such company).

[56] Only if an entity meets the definitional requirements set forth in § 251(h)(1) or (2) does the statute impose § 251(c) obligations. The Commission's proposal to "exempt" advanced services affiliates from these obligations if they meet some *extra-statutory* panoply of separations requirements turns Congress's scheme on its head.

[57] The *NPRM* also notes (at ¶ 91) that, under 47 U.S.C. § 251(h)(2), the Commission may treat as an ILEC any LEC that occupies a position in the market for exchange

(Continued...)

Accounting Safeguards Order, the Commission first repeats its finding there that an affiliate can "be a 'successor or assign' of a BOC" in some circumstances.[58] The Commission then characterizes the *Non-Accounting Safeguards Order* as concluding that "if a BOC transfers to an affiliate entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)," the affiliate would be deemed "an assign of the BOC."[59]

GTE does not agree with the Commission's characterization of its holding in the *Non-Accounting Safeguard's Order*. Although the Commission did employ the broad phrase "network elements" in that order, the particular "elements" in question were traditional bottleneck "local exchange and exchange access facilities," such as local loops.[60] The Commission thus determined only that transfer of these specific facilities to an affiliate should render an affiliate an "assign" subject to regulation as an ILEC.[61] Nowhere in that decision did the Commission address equipment used to provide advanced services. As further explained *infra*, Section II.D.1-2, however, the question whether transfer of bottleneck facilities should render an affiliate an "assign" is distinct

---

(...Continued)
services that is "comparable" to the position occupied by the ILEC, when such carrier has substantially replaced the ILEC. That provision, however, is not relevant here, since no ILEC affiliate offering advanced telecommunications services could conceivably "substantially replace" the ILEC.

[58] *NPRM*, ¶ 90; *see also Non-Accounting Safeguards Order*, ¶ 312.

[59] *See Non-Accounting Safeguards Order*, ¶ 309

[60] *Id.*, ¶ 309.

[61] *Id.*

from that of whether transfer of any network elements, including those readily available on the open market, should subject an affiliate to stringent ILEC-type regulation.[62] The Commission's characterization of the *Non-Accounting Safeguards Order* is thus overbroad.

Even accepting the Commission's characterization for present purposes, however, the *NPRM* does not explain how the Commission's exceedingly intrusive separation requirements could possibly be related to ensuring that an affiliate is not an "assign" either for the reason set forth in the *Non-Accounting Safeguards Order*, or for any other reason.[63] Indeed, upon inspection, most of the Commission's new, intrusive proposals have nothing to do with determining whether an affiliate offering advanced services qualifies as an "assign." For example, although the Commission's proposed rules would prevent an advanced services affiliate from obtaining operating, installation,

---

[62] *See* Section II.D.1-2, *infra*.

[63] The *NPRM* does not even suggest that an ILEC affiliate could ever qualify as a "successor" under the Act, and it does not appear that one could. The term "successor" has an established meaning in the corporate law context; it means, "in the case of a corporation, another corporation which, by a process of amalgamation, consolidation, or duly authorized legal succession, has become invested with the rights and has assumed the burdens of the first corporation." *In re New York, S. & W.R. Co.*, 109 F.2d 988, 994 (3rd Cir. 1940) (quotation marks and citation omitted); *see also Atchison Casting Corp. v. Dofasco, Inc.*, 889 F. Supp. 1445, 1458 (D. Kan. 1995) (the "generally accepted meaning" of "successor" is "another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of the first corporation.") (citing Black's Law Dictionary at 1431, (6th ed. 1990)). Essentially, then, a "successor" corporation is one that, through some process of "legal succession," stands in the shoes of its predecessor as a matter of law. ILEC affiliates clearly do not stand in the shoes of the ILECs.

or maintenance functions from the ILEC in some circumstances,[64] it plainly would not fall within any plausible definition of "assignment" were an affiliate to do so. As a result, ILEC provision of such functions could not possibly render the affiliate an "assign." Similarly, the Commission's proposed requirements of making ILEC/affiliate transactions available for public inspection on the Internet within ten days of the transactions, and of separate officers, directors, and employees for ILECs and affiliates, do not have any reasonable bearing on the question whether an affiliate is an "assign." Finally, the Commission's proposed rule limiting the ways in which affiliates may obtain credit has no conceivable relevance to whether an affiliate is an "assign."

The Commission also seeks comment on whether "an affiliate should not be deemed an assign of the incumbent LEC if the affiliate acquires facilities on its own, and not by transfer from the incumbent LEC."[65] Because there would be no transaction that could plausibly constitute an "assignment" in such a situation, the affiliate could not possibly qualify as an "assign." A contrary determination by the Commission would be inconsistent with the terms of the 1996 Act, would not advance the public interest, and would prevent separate affiliates from competing with CLECs that are not affiliates on a

---

[64] Specifically, the Commission proposes that an ILEC may not "perform[] operating, installation, or maintenance functions associated with the facilities that the . . . affiliate owns or leases from a provider other than the [ILEC] with which it is affiliated." *NPRM Non-Accounting Safeguards*, ¶ 158 (cited in *NPRM*, ¶ 96, which sets forth the Commission's stringent new proposals). Thus, even under the Commission's restrictive approach, the ILEC clearly could provide operating, installation, or maintenance functions except in the enumerated circumstances.

[65] *NPRM*, ¶ 105.

level playing field. Nothing in the 1996 Act requires or justifies such affirmative discrimination against separate affiliates.

In sum, it would be improper for the Commission to impose the proposed rules conditioning non-assign (*i.e.*, non-incumbent) status on these irrelevant factors. As discussed directly below, it would also be inappropriate for the Commission to impose dominant carrier regulation on affiliates on the basis of these considerations.

2. The proposed separation requirements are an unexplained and unwarranted departure from the *Regulatory Treatment* and *Non-Accounting Safeguards Orders*. (¶¶ 90-96)

The Commission's proposed separation requirements are not only unnecessary to ensure that separate affiliates are not "successors" or "assigns" within the meaning of the Act. They also represent an abrupt break from the Commission's own precedents regarding the degree of separation needed to accord non-dominant status to an ILEC affiliate.

First, the Commission's proposed rules are inconsistent with the *Regulatory Treatment Order*. There, AT&T, MCI, and other interexchange carriers argued that affiliates of independent LECs like GTE should have to satisfy the strict § 272 requirements, upon which several of the Commission's new proposals appear to be modeled.[66] The Commission rejected these arguments, finding the existing separation

[66] *Regulatory Treatment Order*, ¶¶ 150-153.

requirements sufficient "to balance the[ ] competing concerns" of potential anti-competitive conduct and undue burden.[67]

Indeed, the Commission specifically observed that the *Fifth Report and Order/Non-Accounting Safeguards* conditions were adequate even though they permit independent LECs and their separate affiliates to "'share personnel and other resources or assets.'"[68] The *NPRM*'s proposed requirements preventing sharing of personnel and operating, installation, and maintenance functions thus represent an abrupt turnabout from the Commission's earlier understanding that it is appropriate for LECs and affiliates to share resources, so long as they are not bottleneck facilities that would confer an unfair competitive advantage on the affiliate. The Commission's shift away from the *Regulatory Treatment/Non-Accounting Safeguards* approach dramatically increases the burden on LECs and affiliates, without any showing that more onerous safeguards are needed.[69]

Moreover, in the *Non-Accounting Safeguards Order*, the Commission explicitly authorized ILECs to establish separate affiliates capable of competing with competitive LECs by offering the bundled services – including interLATA service – that customers demand, so long as those affiliates did not receive assignments of local exchange

---

[67] *Id.*, ¶ 170.

[68] *Id.*, ¶ 165.

[69] GTE does not believe the proposed requirements are necessary for RBOCs either. Indeed, Congress in § 272 enumerated the services to which strict separation requirements must apply (at least for an interim period), and the Commission should not expand that determination here.

facilities that would give them an unfair competitive advantage. The Commission's proposed rules would undermine that holding by making it difficult for interLATA affiliates to remain competitive. This result necessarily flows from the fact that, in today's telecommunications market, few customers are content to obtain individual telecommunications services from different carriers. Customers want bundled services, not exchange service from one company, interLATA service from another, and advanced services from still another. Therefore, under the Commission's proposed rules, ILECs may be obliged to combine their interLATA and advanced services offerings in a single affiliate subject to the Commission's stringent new rules.[70] The Commission's proposed rules, if adopted, could thus eviscerate the *Non-Accounting Safeguard Order.*

GTE therefore urges the Commission to reject the proposed separation requirements, and instead apply, at most, the same separation rules and other safeguards in the context of advanced telecommunications services that it has already adopted for provision of in-region interLATA services. These rules and safeguards include: (1) the *Non-Accounting Safeguards* rules codified in 47 C.F.R. §§ 64.1901 to 1903; (2) the 47 C.F.R. § 32.27 rules governing affiliate transactions; and (3) the 47 C.F.R. § 64.904 requirement that affiliates be subject to audit.[71] As the Commission

---

[70] Moreover, as further discussed *infra* at Section II.B, even if advanced interLATA affiliates or advanced services affiliates could be competitive on their own, this Commission-imposed multiplication of corporate entities is likely to eliminate the economies of scale, as well as the concentration of experience and expertise, that currently place the ILECs in a good position to deploy advanced services rapidly.

[71] The FCC's interconnection rules also require that an ILEC negotiate contracts with

(Continued...)

has repeatedly determined in the past, these safeguards provide adequate protection against discrimination. In addition, these rules were adopted on a full record, and no concrete evidence of favoritism or anti-competitive behavior on the part of the ILECs has since been presented to the Commission that could justify an about-face.

3. The proposed separation requirements will have a detrimental effect on the deployment of advanced services. (¶¶ 90-96)

The proposed separation rules are not only unjustifiable as a matter of law, but also undesirable as a matter of policy. Congress's mandate to the Commission in the 1996 Act was to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[72] Adopting the proposed separation requirements will do just the opposite by needlessly raising carriers' costs and unduly limiting their ability to respond to an ever-changing market.

The proposed rules will make deployment more expensive in a variety of ways. Most notably, the rules would prevent advanced service affiliates from taking advantage of the same legitimate efficiencies of scope and scale that are available to their

---

(...Continued)
non-affiliated entities, and provide interconnection and access to unbundled network services that are at least equal in quality to those offered by the ILEC to its affiliate. *See* 47 C.F.R. §§ 51.301, 51.305, 51.311; *see also* 47 U.S.C. §§ 251(c)(2), (3). Finally, state commissions provide another significant level of safeguard; all interconnection agreements require state commission approval and are available for public review. *See* 47 U.S.C. § 252(e), (h).

[72] 47 U.S.C. § 157 note.